No. 87-705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNION PACIFIC RAILROAD COMPANY,
UNION PACIFIC CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
KANSAS CITY SOUTHERN INDUSTRIES, INC.,
KANSAS CITY SOUTHERN RAILWAY COMPANY,
BURLINGTON NORTHERN, INC.,
BURLINGTON NORTHERN RAILROAD COMPANY, AND
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Petitioners,

v.

ENERGY TRANSPORTATION SYSTEMS, INC., AND
ETSI PIPELINE PROJECT, A JOINT VENTURE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

B.J. BRADSHAW
RICHARD N. CARRELL
LAYNE E. KRUSE
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, TX 77010
(713) 651-5151

HENRY P. SAILER
GREGG H. LEVY *
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

JOHN G. BISSELL
STRONG, PIPKIN, NELSON & BISSELL
595 Orleans Street
Beaumont, TX 77701
(409) 835-4581

Attorneys for Petitioners Union Pacific Railroad Company, Union Pacific Corporation and Missouri Pacific Railroad Company

[Counsel for other petitioners are identified on the inside cover]

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* Counsel of Record

O. J. WEBER, JR.
MEHAFFY, WEBER, KEITH & GONSOULIN
P.O. Box 16
Beaumont, TX 77704
(409) 835-5011

JOHN H. SHENEFIELD *
PETER E. HALLE
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

Attorneys for Petitioners
Kansas City Southern Industries, Inc. and
Kansas City Southern Railway Company

LOUIS B. PAINE, JR.
BUTLER & BINION
1600 Allied Bank Plaza
Houston, TX 77002
(713) 237-3111

JOHN R. LABOVITZ
MARK F. HORNING *
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Petitioners
Burlington Northern, Inc. and
Burlington Northern Railroad Company

WALTER J. CRAWFORD, JR.
WELLS, PEYTON, BEARD, GREENBERG, HUNT & CRAWFORD
550 Fannin Street
Beaumont, TX 77704
(409) 838-2644

GARY SENNER *
STEVEN H. FRANKEL
SONNENSCHEIN CARLIN NATH & ROSENTHAL
233 S. Wacker Drive
Chicago, IL 60606
(312) 876-8059

Attorneys for Petitioner
Chicago and North Western Transportation Company

*** Counsel of Record**

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REPLY BRIEF FOR PETITIONERS

The respondents do not dispute the fact that the first two issues presented—involving antitrust liability for successful litigation and defense of litigation—are ripe for review. Nor do they deny that the circuits are in conflict on these important issues of antitrust law and first amendment doctrine.

Instead, without defending the novel three-part test adopted below, the ETSI respondents rest their opposition on a misconceived premise: that because a hypothetical antitrust defendant *could* litigate with improper motives a case that it wins or defends, this Court should refuse to grant review to resolve the clear conflicts among the circuits on the questions presented. On the same premise, respondents contend erroneously that there is no basis for the rules of law, established in several circuits but rejected below, barring antitrust liability for successful or defensive petitioning. As we demonstrate

in Part I below, respondents' premise ignores virtually all of the standard criteria for granting review and, on the merits, cannot be squared with the principle established by this Court in *Bill Johnson's Restaurants* [1] that litigation must be objectively "baseless" before its constitutional protection can be revoked.

In Part II, we show that ETSI is simply wrong in suggesting that the third and fourth issues presented, on which there are irreconcilable conflicts among the circuits, "are not involved in this proceeding." Opp. at i. In Part III, we demonstrate that immediate review of the issues presented is warranted to avoid irreparable injury to petitioners and an unjustifiable waste of scarce judicial resources.[2]

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICTS AMONG THE CIRCUITS WITH REGARD TO SUCCESSFUL AND DEFENSIVE PETITIONING.

1. ETSI is quick to condemn any "categorical rule" for successful litigation, but the simple fact is that several courts of appeals other than the Fifth Circuit *have* adopted a categorical rule under which success on the merits bars antitrust liability.[3] Indeed, ETSI's counsel

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[1] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

[2] It is neither necessary nor appropriate for us to refute here ETSI's colorful "factual" statement. That ETSI has grossly distorted the facts is evidenced by the recommended opinion of Special Master John F. Sutton, Jr., former Dean of the University of Texas Law School. After a detailed review and analysis of the same record, the Special Master found that ETSI had failed even to make a "prima facie showing" of sham with regard to the railroads' defense of the numerous crossing rights cases or their participation in the successful *Andrews* litigation. Pet. App. C, at 73a, 77a. The liberties taken by ETSI help to explain its suggestion that, in addressing the issues presented, the Court should consider its "factual" statement as a hypothetical case. See Opp. at 4 n.4.

[3] *E.g.*, Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154, 161 (3d Cir. 1984) ("Success on the merits" makes it

elsewhere has advocated such a rule and confirmed that it is the majority view: "Most courts agree with [this treatise] that successful judicial action is not a 'sham,' regardless of the motive of the plaintiff in that action." P. Areeda & H. Hovenkamp, *Antitrust Law* 19 (1987 Supp.). The square conflict between the categorical rule in most circuits and the different standard adopted below by the Fifth Circuit presents a compelling reason for certiorari.

Moreover, ETSI neglects even to cite this Court's recent decision in *Bill Johnson's Restaurants*, upon which the dissent below relied. See Pet. App. A, at 31a-33a. In that case, Justice White's opinion for a unanimous Court expressly held that improper "motive *and* lack of reasonable basis are both essential prerequisites" to abrogating the constitutional protection for petitioning conduct. 461 U.S. at 743 (emphasis added). See *generally* Pet. at 11-12. Thus, while ETSI complains vigorously about any "categorical rule" protecting meritorious litigation, this Court has already embraced such a rule, albeit in a somewhat different context, in evaluating challenges to petitioning conduct. See *id.*[4]

"impossible . . . to prove bad faith"); see also Taylor Drug Stores, Inc. v. Associated Dry Goods Corp., 560 F.2d 211, 213-14 (6th Cir. 1977) (summary judgment affirmed for defendant despite anticompetitive motive because challenged lawsuit to enforce Sunday closing law against competing merchant was successful).

[4] ETSI's abstract definitional concerns about meritorious or successful litigation are of no consequence. Such issues have not previously troubled this Court (or any other court of which we are aware) in addressing petitioning conduct. And the courts below had no difficulty concluding that the "[r]ailroads were successful in the *Andrews* litigation." *E.g.*, Pet. App. B, at 54a n.56. (That conclusion is certainly not undermined because the *Andrews* courts declined to reach counts other than the dispositive water law claim.) Thus, there is no basis for ETSI's position that, because success in litigation may occasionally be "limited [or] peculiar," this Court should neither resolve the conflict among the circuits nor adopt a rule of law addressing antitrust challenges to successful litigation.

ETSI's failure to challenge directly the authorities adopting a "categorical rule" for successful petitioning reflects a pervasive flaw in its opposition. ETSI's analysis gives no weight to the constitutional protection afforded petitioning conduct, to the chilling effect of the rule of law adopted below, or to the burden on courts and antitrust defendants of a rule that both requires relitigation in an antitrust forum of the reasonableness of claims resolved in the successful suit and precludes summary disposition of antitrust challenges to successful litigation. Ignoring all other pertinent considerations, ETSI simply contends that the sham exception should be stretched to ensure that the very rare successful litigant with an improper motive is subjected to treble damage liability.

This Court has never before allowed the intersection of constitutional doctrine and substantive law to be defined by such a "worst case" concern or by such a narrow analytical framework. Instead, the Court has long recognized that "[c]onstitutional provisions are based on the possibility of extremes. . . . Zeal for policies, estimable it may be of themselves, [should not] overlook or underestimate [constitutional] rights." *General Oil Co.* v. *Crain*, 209 U.S. 211, 226-27 (1908). Thus, in *Noerr* itself, the fact "that the railroads' sole purpose . . . was to destroy the truckers as competitors" was held not to "transform conduct otherwise lawful into a violation of the Sherman Act." *Eastern Railroads Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-39 (1961).

This Court should not depart here from that basic approach. In its apparent "[z]eal for [antitrust] policies," the panel majority below ignored the important first amendment considerations that shape the *Noerr* doctrine. It also ignored the fact that regardless of a petitioner's motive, the diminution of competition caused by success-

ful petitioning is attributable to government action.[5] As a result, it reached a conclusion contrary to the holdings of numerous other circuits. This Court should grant review to resolve that irreconcilable conflict.

2. The same basic flaws shape ETSI's cursory discussion of the second question presented, addressing antitrust liability for the defense of litigation. ETSI does not deny that this issue is ripe for review. Nor does it dispute that the holding below squarely conflicts with a recent decision of the Seventh Circuit, and that this Court's decisions uniformly consider sham litigation exclusively in offensive terms. Instead, ETSI simply contends that the "facts" here would justify a result different from that prescribed by the principle of law that governs in the Seventh Circuit. See Opp. at 23. Other than the result it seeks to achieve in this case, ETSI offers no justification for the *legal principle* adopted below—that the same standard should be applied to the defense and the prosecution of litigation—and no answer to the compelling grounds for resolution of the square conflict that the decision below presents.

ETSI, like the court below, takes no regard of the constitutional burdens—on both petitioning rights under the first amendment and due process rights under the fifth amendment—that would result from the imposition of antitrust liability on the defense of litigation. See Pet. at 15-16. Nor does ETSI or the Fifth Circuit acknowledge the fundamental differences, from an antitrust perspective, between initiating and defending a lawsuit. See *id.* at 15. Guidance from this Court is needed precisely because the rule of law in the Fifth Circuit ignores these important considerations while the conflicting rule in the Seventh Circuit accommodates

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[5] See, *e.g.*, *Noerr*, 365 U.S. at 136; Parker v. Brown, 317 U.S. 341, 351-52 (1943). "The government's decision to act reflects an independent governmental choice, constituting a supervening 'cause' that breaks the link between a private party's request and the plaintiff's injury." P. Areeda, *supra*, at 10.

them. *Compare* Pet. App. A, at 27a ("We perceive no reason to apply any different standard to defending lawsuits than to initiating them.") *with Brunswick Corp.* v. *Riegel Textile Corp.*, 752 F.2d 261, 264 (7th Cir. 1984) ("simply defending oneself" in a proceeding brought by another is not "actionable"), *cert. denied*, 472 U.S. 1018 (1985).

II. THE THIRD AND FOURTH ISSUES PRESENTED, AS TO WHICH THERE ARE CLEAR AND EXTENSIVE CONFLICTS AMONG THE CIRCUITS, ARE SQUARELY "INVOLVED IN THIS PROCEEDING."

1. ETSI asserts that the Fifth Circuit's holding on antitrust liability for assistance to State governments is "entirely moot and of no consequence to this case." Opp. at 24. That assertion is flatly untrue. The Fifth Circuit's test is framed in the disjunctive, thus permitting a court to find, as the district court subsequently found on remand, that assistance to a State was a sham even though the antitrust defendant would have had standing to bring the State's suit. See, *e.g.*, Pet. App. A, at 29a-30a.

Thus, while Union Pacific's standing to bring the causes of action asserted by the States in *Andrews* has now been conceded by respondents (see Opp. at 24), the third question presented remains one of compelling importance to the case. Respondent Houston Lighting & Power still contends that Union Pacific's assistance to Nebraska was a sham, relying (as did the district court) on the "subjective intent" prong of the test prescribed below. See Pet. App. F, at 92a-93a.[6] ETSI and HL&P raise similar claims against petitioner Kansas City Southern.[7] Accord-

[6] ETSI's claims against Union Pacific and Chicago & North Western have been dismissed, but those railroads remain defendants in the claims asserted by plaintiff-respondent HL&P.

[7] See, *e.g.*, Opp. at 11 ("The railroads also persuaded three states . . . to bring . . . suit against the federal government.") (emphasis added).

ingly, these issues remain in the case and are squarely presented by the petition.

Contradicting its mootness argument, ETSI also contends that the "assistance" question is not yet ripe for review. Opp. at 25. That contention is frivolous. Relying on the Fifth Circuit's holding below—that litigation assistance afforded a State in prosecuting a successful lawsuit may violate the antitrust laws—the district court has again ordered the railroads to produce all of their attorney-client documents relating to *Andrews*. Pet. App. F, at 90a-91a. This issue is not only ripe; unless the Court grants review at this stage, petitioners will soon be required to produce those documents—a result that could not be undone by review at a later time.

In a footnote, ETSI offers its only substantive answer to the irreconcilable conflict between the holding below and recent decisions of the Fourth, Ninth and Tenth Circuits [8] on the question of assisting a State government. In the other cases, according to ETSI, the antitrust defendant "had an entirely legitimate personal interest in the enforcement of law . . . designed to protect its own legal interests." Opp. at 25 n.26. That distinction evaporates, of course, with ETSI's concession that Union Pacific "*would have had standing* to bring, in its own name, the causes of action asserted by the State of Nebraska in the *Andrews* case." *Id.* at 24 (emphasis in original). The square conflict on the issue of antitrust liability for assisting State governments warrants review by this Court.

2. Ignoring almost entirely the fourth question presented,[9] ETSI denies that the panel majority's holding allows abrogation of *Noerr-Pennington* protection without

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[8] See Pet. at 16-18.

[9] "Whether first amendment rights and *Noerr-Pennington* protection can be abrogated without consideration of the reasonableness of the litigant's legal position and conduct in the proceedings challenged as sham." Pet. at i.

regard to the reasonableness of the litigant's legal position and conduct in the proceedings challenged as sham. See Opp. at 20. ETSI is again wrong in arguing that the Fifth Circuit's three-part test is conjunctive rather than disjunctive. The Fifth Circuit squarely held that antitrust liability may be imposed if the plaintiff proves *only* that "the litigation was undertaken without a genuine desire for judicial relief as a significant motivating factor." Pet. App. A, at 29a-30a. There can be no reasonable dispute about this aspect of the majority's holding: the district court, ignoring the objective merit of petitioners' legal positions and relying *solely* on petitioners' subjective intent, subsequently found that each of the challenged proceedings was a sham. Pet. App. F, at 90a-92a. Indeed, the district court expressly stated that it "finds no need and therefore makes no finding with regard to whether the railroad defendants may have had a reasonable expectation of judicial relief in either the 'window' or *Andrews* litigation." *Id.* at 92a. The Fifth Circuit declined to grant mandamus review of that finding.[10]

ETSI cannot credibly dispute that such a test, based entirely on subjective intent, conflicts with the objective test used in other circuits. Instead, ETSI seeks to blur the conflict with misleading quotations from other appellate decisions. One example illustrates this point. ETSI denies (Opp. at 21 n.22) that the Sixth Circuit recently held that an objective test should be applied in *Westmac, Inc.* v. *Smith*, 797 F.2d 313 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 885 (1987). Yet ETSI's own counsel recently (and correctly) confirmed that in *Westmac*, the Sixth Circuit "attempted to create an objective test for identifying [sham] litigation," the same test that ETSI's counsel endorses in his treatise. P. Areeda, *supra*, at 18.

Thus, in the Sixth Circuit (and numerous others), first amendment rights may not be abrogated without an

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[10] *In re* Burlington Northern, Inc., No. 87-6115 (5th Cir. Nov. 3, 1987).

assessment of the objective reasonableness of the antitrust defendant's position and conduct in the challenged proceeding; in the Fifth Circuit, a court may (and the district court below did) find a sham based *solely* on the antitrust defendant's subjective intent. The conflict between those two rules of law is clear. The confusion among the circuits on the issue is extensive. The fourth question presented warrants this Court's review.

III. REVIEW AFTER TRIAL COULD NOT CURE THE IRREPARABLE INJURY CAUSED BY ABROGATION OF THE ATTORNEY-CLIENT PRIVILEGE AT THIS STAGE.

ETSI argues that certain issues raised by the Fifth Circuit's ruling could be reviewed more effectively after trial. This argument fundamentally misrepresents the posture of the present dispute as well as the nature of the questions presented. Absent immediate review, petitioners' attorney-client privilege would be abrogated, and counsels' ability to give effective legal advice would be chilled. See, *e.g.*, *Maness* v. *Meyers*, 419 U.S. 449, 460 (1975) (appellate courts cannot " 'unring the bell' once the information has been released"). For these reasons, significant issues affecting the attorney-client privilege have been reviewed regularly by this Court in the context of discovery, not after trial. See *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided Court*, 400 U.S. 348 (1971).

In addition, the notion that a "more complete factual record" would shed light on certain issues presented is frivolous. The questions presented are pure questions of law. Moreover, the consequence of deferring review would be to ensure that the same errors of law become the basis for jury instructions at the end of a very lengthy and costly trial, which is not likely to begin before the summer of 1988. There is ample time and compelling reason for this Court to resolve those legal issues before trial.

CONCLUSION

There is no serious dispute that the questions presented are ripe for this Court's review, that the circuits are divided on those questions, and that the questions raise frequently recurring problems on important issues of law. A writ should issue to resolve all four questions.

Respectfully submitted,

B.J. BRADSHAW
RICHARD N. CARRELL
LAYNE E. KRUSE
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, TX 77010
(713) 651-5151

HENRY P. SAILER
GREGG H. LEVY *
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

JOHN G. BISSELL
STRONG, PIPKIN, NELSON & BISSELL
595 Orleans Street
Beaumont, TX 77701
(409) 835-4581

Attorneys for Petitioners Union Pacific Railroad Company, Union Pacific Corporation and Missouri Pacific Railroad Company

O. J. WEBER, JR.
MEHAFFY, WEBER, KEITH & GONSOULIN
P.O. Box 16
Beaumont, TX 77704
(409) 835-5011

JOHN H. SHENEFIELD *
PETER E. HALLE
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

Attorneys for Petitioners Kansas City Southern Industries, Inc. and Kansas City Southern Railway Company

LOUIS B. PAINE, JR.
BUTLER & BINION
1600 Allied Bank Plaza
Houston, TX 77002
(713) 237-3111

JOHN R. LABOVITZ
MARK F. HORNING *
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Petitioners Burlington Northern, Inc. and Burlington Northern Railroad Company

WALTER J. CRAWFORD, JR.
WELLS, PEYTON, BEARD, GREENBERG, HUNT & CRAWFORD
550 Fannin Street
Beaumont, TX 77704
(409) 838-2644

GARY SENNER *
STEVEN H. FRANKEL
SONNENSCHEIN CARLIN NATH & ROSENTHAL
233 S. Wacker Drive
Chicago, IL 60606
(312) 876-8059

Attorneys for Petitioner
Chicago and North Western Transportation Company

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* Counsel of Record